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Volunteers in Municipal Government

Municipalities have long relied on volunteers to provide extra services or to supplement existing services. Volunteers perform many essential governmental tasks, such as fire protection, police protection, and recreation.

Without such unpaid assistance, many of these services would have to be eliminated or operated at a much lower capacity.

However, along with the benefits volunteers provide, there are drawbacks. Municipalities remain liable for the actions of their volunteers. Protection of the volunteers themselves is a priority. Child labor laws must be observed, if the volunteer is a minor. Volunteers may need to be trained to perform certain functions and may be statutorily prohibited from performing others.

Taking proper precautions can reduce the risks of using volunteers. This article points out the pitfalls and suggests steps municipalities should take before using volunteers.

Advantages

In 1987, the League of Kansas Municipalities surveyed its members concerning their use of volunteers. When asked what they considered the greatest benefit volunteers provide, 82.4 percent of the responding officials mentioned the reduction of costs. Other responses included:

- Volunteers give detailed attention to people;
- Volunteers support programs in which they work;
- Volunteers provide a good supplement to paid staff and allow better allocation of recourses;
- Provides volunteers with better understanding of municipal problems and constraints;
- Good public relations; and,
- Brings pride in citizenship.
- Municipal officials listed the drawbacks as:
- Problems in supervision;
- Obtaining insurance;
- Difficulties working with paid staff;
- Absenteeism:
- Getting volunteers in needed areas; and,
- Getting firm time commitments.
- These concerns are just as valid today.

Liability Issues

The use of volunteers opens municipalities up to three large areas of potential liability. First is the dangers presented to the volunteers themselves. How likely is a volunteer to be injured and what will you do if it happens?

The other liability issues are related. One is the concern about liability of the municipality for potential injuries to third parties. The other is the potential liability of the volunteers themselves, and the deterrence effect this has on volunteerism. Each of these topics will be examined separately.

Injuries to Volunteers

It goes without saying that municipalities should take steps to reduce the possibility of injury to volunteers. Just as with paid employees, municipalities must maintain a safe work environment for volunteers.

Municipalities should also look to see if paid employees should perform certain functions. Municipalities should limit the scope of a volunteer's duties so that they are not engaging in hazardous activities.

Precaution is the key here. It may be a good idea to purchase some type of insurance to cover volunteers. Volunteers should also be required to sign a waiver of liability form. While this will not protect the municipality in all cases, it will indicate that the volunteer understood the risks and assumed them.

Liability of Volunteers for Injuries to Others

In 1991, the Alabama Legislature protected volunteers from personal liability when it enacted the Volunteer Service Act. This Act is codified at Section 6-5-336, Code of Alabama 1975. The Act specifically provides:

a. This section shall be known as "The Volunteer Service Act."

b. The Legislature finds and declares that:

   1. The willingness of volunteers to offer their services has been increasingly deterred by a perception that they put personal assets at risk in the event of tort actions seeking damages arising from their activities as volunteers;

   2. The contributions of programs, activities and services to communities is diminished and worthwhile programs, activities and services are deterred by the unwillingness of volunteers to serve either as volunteers or as officers, directors or trustees of nonprofit public and private organizations;

   3. The provisions of this section are intended to encourage volunteers to contribute their services for the good of their communities and at the same time provide a reasonable basis for redress of claims which may arise relating to those services.

c. For the purposes of this section, the meaning of the terms specified shall be as follows:

   1. GOVERNMENTAL ENTITY. Any county, municipality, township, school district, chartered unit or subdivision, governmental unit, other special district, similar entity, or any association, authority, board, commission, division, office, officer, task force or other agency of any state;

   2. NONPROFIT COPORATION. Any corporation which is exempt from taxation pursuant to section 501(a) of the Internal Revenue Code, 26 U.S.C. Section 501(a);

   3. NONPROFIT ORGANIZATION. Any organization which is exempt from taxation pursuant to section 501(c) of the Internal Revenue Code, 26 U.S.C. Section 501(c), as amended;

   4. VOLUNTEER. A person performing services for a nonprofit organization, a nonprofit corporation, a hospital or a governmental entity without compensation, other than reimbursement for actual expenses incurred. The term includes a volunteer serving as a director, officer, trustee or direct service volunteer.

d. Any volunteer shall be immune from civil liability in any action on the basis of any act or omission of a volunteer resulting in damage or injury if:

   1. The volunteer was acting in good faith within the scope of such volunteer's official functions and duties for a nonprofit organization, a nonprofit corporation, hospital or a governmental entity; and

   2. The damage or injury was not caused by willful or wanton misconduct by such volunteer.

e. In any suit against a nonprofit organization, nonprofit corporation or a hospital for civil damages based upon the negligent act or omission of a volunteer, proof of such act or omission shall be sufficient to establish the responsibility of the organization therefore under the doctrine of "respondent superior," notwithstanding the immunity granted to the volunteer with respect to any act or omission included under subsection (a).

Liability of Municipalities for Injuries to Others

Unless a statute expressly declares a municipality liable, the general rule stated by the courts is that a municipality is not liable for the completely personal torts of its officers, employees or agents. *McCarter v. Florence*, 112 So. 335 (Ala. 1927). In *Bessemer v. Whaley*, 62 So. 473 (Ala. Ct. App. 1913), the court held that in order to create liability certain statutes require that the act or omission causing the damage must have arisen while the agent, officer or employee of the city or town

was acting in the line of duty. Subsection (e) of the Volunteer Service Act makes it clear that the Act does not insulate the municipality from suit based on negligent acts or omissions of a volunteer; therefore, the municipality must take measures to guard against the tortious actions of its volunteers. However, the Alabama Supreme Court has held that a municipality may not be held vicariously liable for acts of an agent who is immune from liability under the Volunteer Service Act. In *Wheeler v. George*, 39 So.3d 1061, (Ala. 2009), the Court ruled that a municipality cannot be held liable for the intentional torts of its employees, pursuant to §11-47-190, Code of Alabama 1975.

A municipality should start by assessing its operation to determine where volunteers would make the most positive impact. As part of this assessment, the municipality should take into account the dangers associated with various duties volunteers will be expected to perform.

The municipality must weigh the benefits provided by volunteers against the potential liabilities. In many cases, the best answer is to simply refuse to assign volunteers in certain areas, or to define their duties to eliminate the hazardous activity. If volunteers must be used, the municipality should develop written job descriptions for volunteers.

Next is the recruitment stage. This should not be done in a haphazard manner. The municipality should develop an application procedure. The supervisor or manager of the volunteers, if there is one, should participate actively in this process and in the decision of which persons should be used. Municipalities should examine volunteers to see who best fits their needs.

Municipalities should bear in mind that many individuals volunteer from a desire to be needed, or a goal of contributing in a worthwhile manner to the community. Although they may have a desire to work in one area, they would be willing to serve wherever needed.

The interest of the volunteer should not solely determine whether they are permitted to perform a specific job. Although this is certainly a key factor – after all, if they weren't interested, they wouldn't volunteer – everyone has specific talents which the municipality should seek to utilize. There is no promise that if they volunteer, they will be used like they want. If they aren't suited for the area in which they wanted to work, suggest alternatives or promise to keep their name on file for future reference.

Once the volunteers have been appointed, the municipality should train them. Training is available from the state for volunteer firefighters, reserve police officers and others. Private companies conduct seminars on an infinite variety of topics. Additionally, colleges and universities hold training sessions.

At the very least, volunteers should be instructed on their duties and warned about straying from their assignments. Before they begin, the municipality should provide all volunteers with a written list of what is expected of them, so there can be no doubt concerning the limits of their powers.

Closely related to the subject of training is supervision. Too often, volunteers are given assignments with little or no instruction and/or supervision. This leads to confusion, delay, frustration and the possibility of improper or illegal actions. Although direct supervision may not always be possible, volunteers must have someone available to answer questions at any time. This may be a city employee, a third person or even another volunteer.

Whoever performs this function must understand the duties the volunteers are performing. He or she must be able to give explanations clearly and understandably. This person should listen if the volunteer suggests a different approach and be able to determine if there are any potential hazards. This person should follow up to ensure that the instructions were both understood and performed properly.

Keep records of the work performed by volunteers. These records may prove vital if there is a conflict regarding duties or concerning services provided by the municipality.

Municipalities must also be willing to discipline volunteers when needed. If a volunteer is not performing up to expectations, the municipality must be willing to correct the problem, either through warnings or dismissal. While volunteers are a valuable commodity, in many respects they should be treated like any employee. The municipality is just as liable for their actions.

Finally, municipalities must be aware that the activities of certain types of volunteers are governed by statutes, which must be followed. For instance, the duties and powers of reserve police officers are limited by Section 11-43-210, Code of Alabama 1975. The use of children as volunteers is governed by both state and federal law.

Failure to comply with a statutory requirement may result in fines and the potential expansion of liability for the municipality. Not following a statute may be a showing of negligence per se, meaning that the municipality becomes liable merely by a failure to comply with the statute.

Citizens volunteer due to civic-mindedness and a desire to help. Municipalities can benefit a great deal from encouraging a spirit of volunteerism. However, they must anticipate potential legal problems and take steps to eliminate and reduce them.

Volunteer Status

The Fair Labor Standards Act (FLSA) requires all covered employers to pay their "employees" at least the federal minimum hourly wage every workweek. If a person is compensated for volunteer work, that person could be considered an "employee" for purposes of the FLSA. The remuneration a volunteer receives is only one factor in a common-law agency test for determining whether the individual is an 'employee." *Bryson v. Middlefield Volunteer Fire Dept., Inc.,* 656 F.3d 348 (6th Cir.2011).

The FLSA recognizes the generosity and public benefits of volunteering and does not seek to pose unnecessary obstacles to *bona fide* volunteer efforts for charitable and public purposes. In this spirit, in enacting the 1985 FLSA Amendments, Congress sought to ensure that true volunteer activities are neither impeded nor discouraged. Congress, however, also wanted to minimize the potential for abuse or manipulation of the FLSA's minimum wage and overtime requirements in "volunteer" situations.

Section 3(e)(4)(A) of the FLSA and 29 C.F.R. §§ 553.101 and 553.103 indicate that an individual is a volunteer, not an employee of a public agency, when the individual meets the following criteria:

1. Performs hours of service for a public agency for civic, charitable or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered.... Although a volunteer can receive no compensation, a volunteer can be paid expenses, reasonable benefits or a nominal fee to perform such services;
2. Offers services freely and without pressure or coercion, direct or implied, from an employer; and
3. Is not otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.

Section 3(e)(4)(A) of the FLSA, 29 U.S.C. § 203(e)(4)(A), also permits public agency employees to volunteer their services to their employing public agency, as long as there is no coercion or undue pressure on the employee, and they do not provide the same type of services for which they are employed. The phrase "same type of services" means "similar or identical services." 29 C.F.R. § 553.103(a). *See*, Wage and Hour Opinion Letter FLSA2009-35.

Neither the FLSA nor the 1985 FLSA Amendments define the term "nominal fee." However, the Department of Labor has issued regulations providing guidance in this area. The regulations focus on preventing payment for performance, which is inconsistent with the spirit of volunteerism contemplated by the FLSA. Thus, a fee would not be considered nominal if it is, in fact, a substitute for compensation or tied to productivity. See 29 C.F.R. § 553.106(e); see also Wage and Hour Opinion Letter FLSA2005-51. Generally, a key factor in determining if a payment is a "substitute for compensation" or "tied to productivity" is "whether the amount of the fee varies as the particular individual spends more or less time engaged in the volunteer activities." Wage and Hour Opinion Letter FLSA2005-51. If the amount varies, it may be indicative of a substitute for compensation or tied to productivity and therefore not nominal. See id.; see also 29 C.F.R. § 553.106(e). Whether the nature and structure of payments made to individuals would result in their losing volunteer status is determined by examining the total amount of payments made (expenses, benefits, and fees) in the context of each particular situation. *See*, Wage and Hour Opinion Letter FLSA2008-16. Further, when a public agency employee volunteers, the Department of Labor will presume the fee paid is nominal as long as the fee does not exceed 20 percent of what the public agency would otherwise pay to hire a full-time employee for the same services. This 20 percent rule is derived from the FLSA and implementing regulations. *See*, Wage and Hour Opinion Letter FLSA2005-51. A willingness to volunteer for 20 percent of the prevailing wage for the job is also a likely indication of the spirit of volunteerism contemplated by the 1985 amendments to the FLSA. *See*, Wage and Hour Opinion Letter FLSA2006-28.

Selected Cases, Attorney General's Opinions and Ethics Opinions

- A county could be subject to suit in tort for injuries sustained by volunteer workers on county road maintenance. AGO 1985-0348.
- Act No. 91-439, the Volunteer Service Act, provides immunity for commissioners of public housing authorities appointed by the mayor. AGO 1992-0097.
- Individuals who serve on local emergency planning committees are immune from liability under Section 6-5-336, Code of Alabama 1975, the Alabama Volunteer Services Act. AGO 1992-0146.
- Uncompensated members of a board established to advise an E911 board are protected from liability by the Volunteer Service Act, Section 6-5-336, Code of Alabama 1975. AGO 1992-0292.
- Funds raised by a group of volunteers for industrial development must be used for that purpose once they are deposited in an account under the control of the industrial development board. Funds which remain under the control of the volunteers may be spent for other purposes. AGO 1993-0081.

- Reserve law enforcement officers who serve without compensation appear to be protected from tort liability by the Volunteer Service Act, Section 6-5-336(d), Code of Alabama 1975. AGO 1993-0085.
- Volunteers performing services without pay for the Alabama Emergency Management Agency are protected by the Volunteer Service Act, Section 6-5-336, Code of Alabama 1975. AGO 1993-0147.
- A municipal governing body must determine whether reimbursing mileage to volunteers serves a municipal purpose. AGO 1995-0134.
- A library organized by Sections 11-90-1, et seq., Code of Alabama 1975, may accept donations from volunteer library members who will operate a second-hand antique shop for the purpose of raising funds which will be donated to the library. No library property or funds may be used in this endeavor. AGO 1997-0151.
- A mayor and a councilmember who serve on a volunteer fire department without compensation may vote on matters related to the operation of the department. They may vote on fire call compensation only if they do not receive fire call compensation themselves. AO NO. 1997-76.
- A municipality is not required to place a private ambulance service in rotation with a volunteer rescue squad for dispatch by municipal police. AGO 1999-0108.
- An absentee elections manager may appoint individuals, including members of his or her staff, or unpaid volunteers, to assist in the performance of the manager's duties. AGO 1996-0177.
- A city councilman, who is the owner and operator of a surveying and engineering firm, may design plans and specifications for a new town hall at no cost to the town of which he serves as councilman; provided, that no particular course of action is required as a condition to the receipt of the volunteer services. AO NO. 1999-031.
- An attorney, volunteering his or her time to review and comment on a draft business license ordinance proposed by a municipality is not required to register as a lobbyist with the Alabama Ethics Commission if the activities undertaken do not rise to the level of promoting, opposing, influencing or attempting to influence the introduction, defeat, or enactment of legislation or a regulation. AO NO. 2003-031.
- An uncompensated president of a local volunteer fire department does not hold an office of profit. Therefore, a member of the Barbour County Board of Education may therefore serve in that position. AGO 2006-0138.
- A reserve police officer was not entitled to summary judgment on the ground that he was immune from liability, for allegedly beating an arrestee, under Alabama's Volunteer Service Act (Act) because immunity provided to volunteers was limited to good faith actions and cases in which the damage or injury was not caused by willful or wanton misconduct by the volunteer, and the arrestee's complaint alleged actions outside of the protections of the Act. *Johnson v. Clanton*, 2005 WL 1364376, ---F.Supp.2d ---, (M.D. Ala. 2005).
- Uncompensated county park and recreation board members serving on a board created pursuant to Section 11-22-1, et seq., of the Code of Alabama, 1975, do not hold an office of profit. AGO 2009-0064.
- Volunteer fire department, whose truck collided with car, injuring car's occupants, was a "nonprofit organization," as defined in the Volunteer Service Act and entitled to immunity under the Act and foreclosed from vicariously sharing immunity with the firefighters based on the master-servant relationship. The assistant fire chief did not act willfully or wantonly and, thus, was entitled to immunity under Volunteer Service Act. *Ex parte Dixon Mills Volunteer Fire Dep't, Inc.*, 181 So. 3d 325 (Ala. 2015).
- Volunteer fire department did not become professional fire department not entitled to immunity because the city donated money to it. Since the volunteer fire department and its firefighters were immune from liability, the city could not be vicariously liable for firefighters' alleged negligence or liable for wanton or intentional conduct. *Ex Parte Labbe*, 156 So. 3d 368 (Ala. 2014).
- Although the Volunteer Service Act (VSA) protects volunteer members of the industrial development board (IDB) from liability in tort so long as their actions were not willful and wanton and renders the IDB itself immune from vicarious liability, the VSA does not prevent the IDB from being sued and facing liability for breach of contract suits. *Indus. Dev. Bd. of City of Montgomery v. Russell*, 124 So. 3d 127 (Ala. 2013).

- Where a state, county or municipal board is authorized by state legislation and no compensation is authorized for members of the board, these people are considered volunteers. Such a board qualifies as a governmental entity pursuant to section 6-5-336 of the Code of Alabama, and its members are immune from civil lawsuits based on this same statutory authority. AGO 2010-0067.
- Volunteer firefighters may be granted limited immunity under section 6-5-335 of the Code of Alabama when acting gratuitously and in good faith. AGO 2011-0061.